Supreme Court, U.S.
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No. 91-1934

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDWARD A. GROBEL, *Petitioner,*

v.

LIQUID AIR CORPORATION, *Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

Respondent's Brief in Opposition to Petition for Certiorari

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QUESTION PRESENTED FOR REVIEW

Both courts below held (in unpublished opinions and without dissent) that Petitioner Grobel failed to establish a prima facie case that respondent Liquid Air Corporation unlawfully terminated his employment because he was 50 years old. Grobel's Petition asks this Court to review the evidence and to determine whether he did or did not make a prima facie case.

Grobel's termination resulted from a Federal Trade Commission-ordered sale of most of Liquid Air's Texas operations. The lower courts accordingly examined the case pursuant to the reduction-in-force scenario. Grobel asserts this analysis was erroneous, but Liquid Air believes it was eminently correct.

The judgments of the courts below do not conflict with holdings of this Court or of other circuits. The case does not satisfy the exacting standards of this Court's Rule 10.1: "special and important reasons" for granting certiorari are not found in this case, which presents a fact-specific question.

LIST OF PARTIES

As named in the caption, petitioner Edward A. Grobel and respondent Liquid Air Corporation are the only parties in this case.

L'Air Liquide (a French corporation) is the parent of Liquid Air Corporation. Liquid Air has no subsidiaries other than wholly owned subsidiaries.

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JURISDICTIONAL STATEMENT

Respondent Liquid Air Corporation challenges the Jurisdictional Statement contained in Grobel's Petition, at 7.

Petitioner cites two statutes, presumably in response to the requirement in this Court's Rule 14.1(e)(iv) that a petition for a writ of certiorari contain "[t]he statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari."

Petitioner's Jurisdictional Statement invokes only 28 U.S.C. §§ 1331 and "1343 (1)-(4)." Respondent presumes that the latter reference is an error and should have been to 28 U.S.C. § 1343(a) (1)-(4).

Both cited statutes confer jurisdiction on *district* courts, not on this Court. Both are quoted in relevant part here:

> The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States.

28 U.S.C. § 1331.

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person [alleging the deprivation of certain civil rights].

28 U.S.C. § 1343(a).

Nor does Grobel's Petition comply with Rule 14.1(e)(i)-(ii), which requires a jurisdictional statement to contain the date of the entry of the judgment sought to be reviewed.

Accordingly, this Court should deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Liquid Air terminated Grobel when his job was eliminated as a result of a Federal Trade Commission order that Liquid Air divest most of its industrial gases business in Texas. Grobel was only 50 years old when he was terminated.

Liquid Air had informed Grobel and approximately 110 other Texas employees of the proposed divestiture 10 months in advance. Tr. [trial transcript] I-14. As part of a package to be sold, Grobel well knew that his employment with Liquid Air soon would end.

Liquid Air reorganized. The divestiture package became a temporary corporation called NuCorp. Grobel's duties in states other than Texas (about 40% of his job) were reassigned

to his counterparts in other regions. Tr. II-33-34. Grobel did not then claim any age discrimination.

A small new company, Tri-Gas, bought NuCorp, which essentially was Liquid Air's "air gases" (nitrogen, oxygen, and argon) former operation in Texas. The owners of Tri-Gas decided not to hire Grobel and four other former Liquid Air employees. That decision (but not the reason for it) was made and announced only a few days before Tri-Gas opened for business in August of 1987. Tr. II-36. Still Grobel said nothing to protest age discrimination.

Effective September 8, 1987, Liquid Air listed Grobel as terminated from employment but provided generous severance benefits. Plaintiff's Exhibit No. 3. Grobel's $48,000 salary and fringe benefits continued for six months. He also received unemployment compensation. Tr. I-68, 74-75.

Not until near or after the end of the allowable 300-day filing period did Grobel finally submit an age discrimination charge to the Equal Employment Opportunity Commission. In his charge Grobel said that Liquid Air had terminated him because of his age. The EEOC dismissed the charge because, as Grobel admitted, the agency "could not find that there was age discrimination." Tr. I-48-49. Neither then nor later did Grobel complain that Tri-Gas failed to hire him because of his age or otherwise. Nor has Grobel claimed that Liquid Air had anything to do with the decision of Tri-Gas not to accept him.

At trial the thrust of Grobel's case was that, because of his age, Liquid Air didn't manufacture or find a spot for Grobel after the divestiture to Tri-Gas.

Both courts below found it very significant that Tri-Gas also rejected an *older* Liquid Air employee, Ben Day. When Liquid Air learned that unexpected news, it transferred Day to another region. Tr. II-21. Grobel's Petition does not once mention this critical fact.

Day, six years older than Grobel, was the only Liquid Air Texas employee whom Liquid Air did not terminate as a result of the divestiture!

A jury in the Northern District of Texas, after a two-day trial in 1991, decided that Grobel's age was a "determinative factor" in his discharge, and the jury labeled the discharge "willful." The jury found damages for past and future lost income.

Liquid Air timely moved for directed verdict at trial, denying that Grobel's evidence established a prima facie case of age discrimination. Tr. II-97.

After the verdict was returned, Liquid Air submitted a timely motion for judgment notwithstanding the verdict, still insisting that Grobel had failed to prove a prima facie case. R. [record] 111. The trial court (McBryde, J.) granted that motion. R. 155. Also it conditionally granted Liquid Air's alternative motion for new trial on the grounds that the verdict was contrary to the great weight of the evidence. *Id.*

In a short *per curiam* ruling, the Court of Appeals for the Fifth Circuit affirmed (Politz, C.J., and Reavley and Davis, J.J.). Citing a solitary case, the panel wrote: "Plaintiff [Grobel] fails even to make a prima facie case." Appendix A to Pet. at 27.

Grobel seeks a discretionary writ of certiorari so that this Court may review the lower courts' unanimous rulings. Liquid Air opposes Grobel's Petition.

SUMMARY OF THE ARGUMENT

Grobel's Petition incorrectly maintains that the Fifth Circuit erroneously demanded *more* proof from him because he was terminated in a reduction-in-force (RIF) scenario. Liquid Air's argument explains Grobel's error, illustrates the correct-

ness of the judgment of the court of appeals, and concludes that this Court should deny certiorari.

Grobel failed to prove two ingredients of a prima facie case of age discrimination in the RIF scenario that this lawsuit presents.

In the Fifth Circuit, a RIF plaintiff must prove, among other things, that the employer treated younger persons more favorably at or about the time that the plaintiff claims to have been the victim of age discrimination. *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805, 812-13 (5th Cir. 1991).

First, Grobel failed to produce such proof. In fact, Liquid Air proved that it treated *all* of its Texas air gases employees the same: they were packaged and offered for sale as the FTC mandated. The buyer, Tri-Gas, accepted some 100 employees in the package but rejected Grobel and four others. The inquiry must focus on those five persons. Liquid Air treated one of them more favorably than the others by transferring him. But he was the *oldest* in the group! Liquid Air then terminated Grobel and all others rejected by Tri-Gas.

Secondly, Grobel failed to prove that he was qualified for any position within Liquid Air outside the divested region. Proof of such qualification is another requirement of a prima facie case. *Id.* at 812.

ARGUMENT

Grobel Was Not Held to an Erroneously High Burden of Proof

Grobel hints at but does not squarely set out a conflict between the Fifth Circuit and the Sixth Circuit in arguing that certiorari should be granted. Pet. at 15.

No such conflict exists. Grobel is in error in asserting that the trial court relied on Sixth Circuit law in analyzing whether

Grobel established a prima facie case. When the Fifth Circuit decided Grobel's appeal, it neither looked to the Sixth Circuit opinion nor even commented on Grobel's argument on this point.

In his opinion granting judgment for Liquid Air notwithstanding the verdict, the trial court correctly cited *Ridenour v. Lawson Co.*, 791 F.2d 52 (6th Cir. 1986), for the proposition that an ADEA plaintiff in a reduction-in-force scenario has "a greater burden of supporting charges of discrimination than an employee who was not terminated for similar reasons." Appendix A to Pet. at 43.

Grobel illogically argues that "the Fifth Circuit has recognized that the Sixth Circuit's standard is in error." Pet. at 15. Grobel's reasoning is flawed. Grobel argues that the Fifth Circuit's recognition of the Sixth Circuit's "error" is found in *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985). This obviously is impossible because *Thornbrough* was decided a year before *Ridenour*.

More importantly, Grobel's excerpt from the discussion in *Thornbrough* of *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 71 L. Ed. 2d 655, 102 S. Ct. 1439 (1982), omits this clarification:

> An argument could be made that *Williams* eased rather than heightened the burden on employment discrimination plaintiffs by eliminating the necessity of showing actual replacement by a younger worker; instead *Williams* allows employees to establish a prima facie case through any type of circumstantial evidence that younger employees were more favorably treated than older employees.

Thornbrough, 760 F.2d at 642-43.

Even more significantly, since *Ridenour* was decided in 1986, the Fifth Circuit has emphasized anew the differences between elements of prima facie age discrimination cases in RIF situations and in ordinary scenarios. *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805 (5th Cir. 1991). Many other circuits have recognized the-same distinction between the two types of age discrimination cases. *Verbraeken v. Westinghouse Electric Corp.*, 881 F.2d 1041, 1045-46 (11th Cir. 1989), *cert. dismissed*, 493 U.S. 1064, 107 L. Ed. 2d 1012, 110 S. Ct. 884 (1990); *Schuler v. Polaroid Corp.*, 848 F.2d 276, 278 (1st Cir. 1988) (summary judgment for employer affirmed); *Palmer v. United States*, 794 F.2d 534, 537 (9th Cir. 1986) (prima facie case not established); *Holley v. Sanyo Mfg., Inc.*, 771 F.2d 1161, 1165 (8th Cir. 1985) (prima facie case not established); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 343 (D.C. Cir.), *cert. denied*, 464 U.S. 994, 78 L. Ed. 2d 683, 104 S. Ct. 488 (1983).

In either scenario, the Fifth Circuit has stated, "a prima facie case is fairly easily made out." *Amburgey*, 936 F.2d at 812. Nevertheless, as the courts below recognized, Grobel failed to do so.

Grobel Did Not Prove That Younger Employees Were Treated More Favorably

The courts below recognized that Grobel's evidence failed to prove that Liquid Air provided better treatment to the employees younger than Grobel who had been expected to be acquired by Tri-Gas but who were turned away by Tri-Gas, just as Grobel was.

At least three Fifth Circuit cases establish that an age discrimination plaintiff, to prove a prima facie case in a reduction-in-force scenario, must proceed differently from the requirements established for other age discrimination cases. *Amburgey v. Corhart Refractories Corp., Inc.*, 936 F.2d 805

(5th Cir. 1991); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985); *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 71 L. Ed. 2d 655, 102 S. Ct. 1439 (1982). Taken together, these cases teach that a RIF plaintiff must show that younger employees received more favorable treatment. In a typical (non-RIF) case, a plaintiff must prove that someone younger replaced him.

Focusing on this issue, the Court of Appeals for the Fifth Circuit stated in its succinct ruling on Grobel's appeal:

> Liquid Air was able to rehire one of the employees rejected by Tri-Gas, but that employee was older than plaintiff and the decision was thus clearly foreign to age-based discrimination.

Appendix A to Pet. at 26.

Grobel testified that Donna Dailey, Robert Castle, Jim Ogle, and Ben Day were the other Texas Liquid Air employees whom Tri-Gas, at the last minute, did not accept. Tr. I-22.

Carmen Parent, Liquid Air's manager of employee relations and equal employment opportunity, testified as an adverse witness. She identified the Liquid Air employees whom Tri-Gas elected not to accept as Grobel, Dailey, Castle, Day, and Johnny Myers, but not Ogle. Tr. I-108. The discrepancy between the two lists was not resolved. Parent produced Plaintiff's Exhibit No. 3, containing data about the five employees whom Tri-Gas waved off. The information contained in Plaintiff's Exhibit No. 3, because of its importance, is reproduced here:

Name	Title	Birth Date	Hire Date	Termination Date
Castle, Robert M.	Sr. Sales Rep.	12/17/59	11/25/85	09/08/87
Dailey, Donna C.	Reg. Sales Assis.	10/22/51	10/01/74	09/18/87
Day, Ben J.	Reg. Dist. Mgr.	01/17/31	06/26/57	transferred to SE Region
Grobel, Edward A.	Reg. Applic. Mgr.	01/09/37	03/07/66	09/08/87
Myers, Johnnie J.	Reg. Dist. Mgr.	01/31/37	10/22/84	04/30/87

The most important employee on the list, Liquid Air submits, is Ben Day. Grudgingly Grobel testified that "Ben Day was my age or older." Tr. I-23. Plaintiff's Exhibit No. 3 establishes that Day actually is *six years* older than Grobel.

It is undisputed that Liquid Air transferred Day to another regional office. Liquid Air did so only after the surprising news that Tri-Gas would not hire Day.

It is incredible for Grobel to insist that Liquid Air treated younger employees more favorably when Day, six years older than Grobel, is the only employee who was treated more favorably than Grobel. In his Petition, Grobel totally ignores this problem by treating Day as if he didn't exist. Grobel concentrates his argument on Castle and Dailey as well as events completely unrelated to the FTC-mandated divestiture. Grobel argues that Liquid Air treated Castle and Dailey, who are younger than Grobel, more favorably because although they initially were terminated, they later were rehired.

At trial, Grobel was unable to testify about Dailey or Castle because he lacked personal knowledge. Carmen Parent of Liquid Air testified without contradiction that Liquid Air termi-

nated Dailey, who "subsequently found employment on her own through answering of a newspaper advertisement of Big Three industries." Tr. I-111-112. (It was L'Air Liquide's acquisition of Big Three that triggered the FTC order for Liquid Air to divest most of its Texas operations.) Parent explained that Liquid Air and Big Three operate independently. Parent testified in response to Grobel's attorney's questions:

> Q. Again, it was just a sheer coincidence that Donna Dailey was also rehired?
> A. Yes. We had nothing to do with her application to Big Three or her subsequent hire.
> Q. She wasn't told by anybody at Liquid Air to go and apply for a position at Big Three?
> A. To my knowledge, she answered an advertisement in the newspaper for a job that they were looking to fill.

Tr. I-112-113.

Grobel's trial counsel similarly interrogated Parent about what happened to Castle after Liquid Air terminated him. (Grobel erroneously testified that Castle voluntarily quit. Tr. I-22-23.)

> Q. And what was the process? How did that happen?
> A. As I understand it, after Mr. Castle became unemployed, he submitted his [candidacy] to various employment agencies. And it so happened, very coincidentally, at the same time or around the same time that he was looking for a position that Liquid Air had a sales rep position on the west coast in California; and that opening was listed with a sales consultant agency for local hire. And it was by sheer accident that the agency in California happened to get in touch with the agency in Texas where Mr. Castle had registered his [candidacy], and he ended up being reemployed through this agency and relocated

> himself to California. And Liquid Air incurred some pretty stiff agency fees in the process of rehiring a former employee.

Tr. I-110.

Patrick Verschelde, a Liquid Air executive, told the jury that when he managed the company's western region (which was not involved in the divestiture in Texas), he hired Castle through an employment agency that charged a $10,000 fee. The agency told Verschelde, who had a vacancy for a sales representative position that ranked far lower than Grobel's, that it had a candidate from Houston who previously had worked "with a gas company." Not until too late did Verschelde learn that Liquid Air was that gas company. Tr. II-79.

The jury was not free to reject evidence that Dailey and Castle, after being terminated by Liquid Air, found other positions through their own efforts and coincidence, because Grobel offered *no* contrary evidence.

Neither the Fifth Circuit opinion nor Grobel's Petition mentions Liquid Air employees Ogle and/or Myers. Grobel did not testify about Myers at all, and he lacked personal knowledge of what happened to Ogle. The trial court essentially disregarded those one or two employees who did not go to work for Tri-Gas because "apparently both of them quit." R. 162. Certainly Grobel offered no evidence that Liquid Air treated either or both of those younger employees more favorably than it treated Grobel.

Grobel proved no more than the admitted fact that Dailey and Castle are younger than he. Grobel did not deny that they qualified for the jobs that they found with Big Three and Liquid Air. Grobel did not apply for or claim to be qualified for either position. He did not claim entitlement to "bump" Dailey or Castle because of seniority or otherwise. Grobel did not

prove or even argue that Liquid Air hired anyone from outside the company when he was terminated. The inadequacy of Grobel's case is apparent in comparison to the facts in a leading Fifth Circuit age discrimination reduction-in-force case, *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633 (5th Cir. 1985):

> [T]he only evidence offered by Thornbrough in support of his claim of age discrimination was that several younger, allegedly less well-qualified employees were retained during the Railroad's reduction-in-force, and that, at the time of his discharge, two younger, allegedly less well-qualified employees were hired.

Id. at 643.

Grobel Did Not Prove That He Was Qualified for Any Other Position That Was Vacant When He Was Terminated

Because Grobel's layoff resulted from the divestiture or reduction in force, another element of his prima facie case was that he was qualified for some other position. Contrary to Grobel's Petition at 17-18, Liquid Air assuredly did *not* stipulate to Grobel's qualifications for such a position. Instead, Liquid Air recognized and stipulated in the pre-trial order that Grobel was *technically* qualified for the position that he had held and that was eliminated, regional applications manager. R. 49.

At trial, Grobel alone testified that he qualified for other jobs within the company:

> Q. What was your response to that information [that he was to be terminated]?
> A. My response was that there were jobs open within Liquid Air that I wanted.
> Q. Were you qualified for these positions?
> A. *I felt I certainly was.*

Tr. I-15, emphasis added. Such self-serving testimony is insufficient:

> GM further suggests that merely because a plaintiff testifies he was capable of handling one or two or many salaried jobs other than his own, yet was not relocated to such a job during the reduction, is not enough to show violation of the ADEA. We agree with this argument in principle and accordingly reverse on this point.

Williams, 656 F.2d at 129. *See also Aungst v. Westinghouse Elec. Corp.*, 937 F.2d 1216, 1223 (7th Cir. 1991).

Moreover, Liquid Air presented evidence that Grobel was *not* the best qualified person (assuming that he applied) for the very few positions in question.

The jury knew from Liquid Air's evidence that Grobel's former supervisor at Liquid Air, Hugh Stormer (who died before trial), had stated in a memorandum that Grobel lacked initiative, drive, resourcefulness and innovativeness, and had a negative attitude. Tr. I-119; Plaintiff's Exhibit No. 1i.

Lee Elder, a former co-worker of Grobel's who at the time of trial was employed by Tri-Gas, testified at the trial. Elder told the jury that Grobel did not work hard, usually left early each day, and voluntarily relinquished a spacious, prestigious office and moved to a small office near the rear of Liquid Air's space so that their boss, Stormer, wouldn't see Grobel leave early through the back door. Tr. II-44-47. Grobel readily admitted leaving early most days to get a jump on rush hour traffic. Tr. II-93.

Patrick Verschelde at the time of trial was a Liquid Air executive. He testified about a customer visit that he and Grobel had made a few years previously. It concluded in mid-afternoon. Grobel announced that he was through for the day and was going home for a drink and a swim. Verschelde

declined Grobel's invitation to join him and continued working. Tr. II-68. On another occasion, Verschelde testified, Grobel refused to meet him at a plant because of the inconvenient time the customer had specified – 3 o'clock in the morning. Tr. II-70.

Grobel's known laziness contrasts sharply with the qualifications of other employees to whom Grobel now compares himself, Dick Gerdes and Dan Urban.

Liquid Air eliminated Gerdes' job as an area sales manager, in which it is undisputed that he "was performing very well." Gerdes was laterally transferred to a job that would have been a promotion for Grobel. Tr. II-80-81. Grobel did not explain to the jury why he considered himself qualified for promotion or for the job that Gerdes received. Urban had received a bonus, signifying superior performance, just before he was reassigned. Accordingly, when a vacancy occurred at the Liquid Air Technical Center, Urban was considered "the best performer and the most qualified person to take that job." Tr. II-82. Again, the only evidence of Grobel's qualifications came from Grobel himself. But he admitted that he had not received a bonus in several years. Tr. I-13.

Grobel's Petition refers to employee Joe Hirsch. The trial judge properly ruled that evidence of Hirsch was irrelevant to Grobel's claim of being terminated because of his age. Grobel claimed that Liquid Air allowed Hirsch to elect whether to be demoted from his regional sales manager position, which was eliminated in the divestiture, to hydrogen sales representative or to remain in the divestiture package. Had he remained in the package, Tri-Gas might have accepted him but could have rejected him as it did Grobel. No evidence was presented that Liquid Air treated Hirsch more favorably because he was

younger than Grobel, nor is there evidence of Grobel's qualification to be a hydrogen sales representative.

Silas McKnight was a manager in the carbon dioxide division of Liquid Air, which was totally separate from the air gases division in which Grobel had worked. McKnight's alleged discriminatory remark to Grobel occurred, if at all, a month *after* Grobel's termination. Tr. I-93-94. In the Fifth Circuit, proof is required that a plaintiff is qualified to assume another position *at* the time of his termination. *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 71 L. Ed. 2d 655, 102 S. Ct. 1439 (1982). Even Grobel does not claim that McKnight (who is older than Grobel) had anything to do with his termination. Whatever McKnight said, therefore, is no evidence that Liquid Air treated younger employees better than Grobel, and it has nothing to do with Grobel's qualifications for another position at the time he was terminated.

Grobel devotes much of his Petition to discussing occurrences elsewhere within Liquid Air that happened after and independently of the divestiture that abolished his job. Grobel claims that Liquid Air failed to find a job for him following Liquid Air's forced withdrawal from Texas, although Grobel did not state in his EEOC charge, pleadings, or pre-trial order that Liquid Air denied him a transfer. Liquid Air insists that the Age Discrimination in Employment Act, 29 U.S.C. § 626 *et. seq.*, did not require it to transfer Grobel because he was 50 years old and his job in Texas had vanished in the divestiture. "Where an employer reduces his work force for economic reasons, it incurs no duty to transfer an employee to another position within the company." *Ridenour v. Lawson Co.*, 791 F.2d 52, 57 (6th Cir. 1986).

CONCLUSION

The outcome of this case may be monumentally important to Grobel and to Liquid Air, but not to anyone else and certainly not to the jurisprudence of the nation. This overburdened Court cannot be expected to review whether Grobel established or failed to establish a prima facie case of age discrimination in a reduction-in-force setting. Grobel has shown no defect in the judgment of the Court of Appeals for the Fifth Circuit, which affirmed judgment in the trial court for Liquid Air notwithstanding the verdict.

For the reasons set forth above, this case was correctly decided below and does not raise issues that are proper for review on a petition for certiorari.

Respectfully submitted,

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